BRB Nos. 11-0477
and 11-0477A

MICHAEL J. GOINS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LAKE CHARLES STEVEDORES, INCORPORATED	)	DATE ISSUED: 03/21/2012
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Michael J. Goins, Glenmora, Louisiana, *pro se*.

Alan G. Brackett and Robert N. Popich (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals, and employer cross-appeals, the Decision and Order on Remand (2006-LHC-1976, 1977, 1978, and 1979) of Administrative Law Judge Clement J. Kennington rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). In an appeal by a claimant without legal representation, we will review the findings of fact and conclusions of law of the administrative law judge to determine if

they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. *Id.*

This case is on appeal for the third time. Claimant was involved in four separate accidents in the course of his work as a longshoreman, the last of which occurred on April 25, 2005, while he worked for employer. Following the April 25, 2005, incident, claimant stated he was no longer able to work due to pain. He sought compensation under the Act for injuries to his back, right shoulder, and right hip, as well as for "mental unrest" which he alleged was due to ll of the work incidents. He also alleged that the April 25, 2005, incident resulted in an aggravation of all of his prior work-related injuries.

In his decision dated May 8, 2007, the administrative law judge found claimant entitled to temporary total disability benefits for the periods of January 17 through February 28, 2001, August 14, 2001, through December 10, 2002, July 6 through September 21, 2004, and from April 25, 2005, through July 5, 2006, noting that claimant resumed full-duty work following each of these periods without a loss of pay or residual impairment except for the last period, at which time he found that claimant's inability to work was due solely to his non-work-related mental impairment. The administrative law judge also found claimant entitled to, and employer liable for, all reasonable medical benefits arising out of the April 25, 2005, work-related injuries pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a).

Claimant sought modification of the administrative law judge's decisions pursuant to Section 22 of the Act, 33 U.S.C. §922. Employer filed a motion to compel an updated medical examination of claimant by Dr. Perry. The administrative law judge, by Decision and Order on Modification dated July 29, 2008, denied claimant's request for modification and, furthermore, suspended payment of compensation pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), based on claimant's unreasonable refusal to undergo an examination by Dr. Perry. Claimant appealed. In its decision, the Board reversed the administrative law judge's finding that claimant's psychological condition is not work-related, vacated his finding that claimant is not entitled to disability benefits as a result of the April 25, 2005, injury, and remanded the case for further consideration of claimant's entitlement to disability and/or medical benefits for the period of claimant's physical disability following that most recent accident, in conjunction with any evidence of disability due to claimant's psychological condition. *M.G. [Goins] v. Lake Charles Stevedores*, BRB Nos. 07-0891, 08-0803 (Aug. 14, 2009) (unpub.), *recon. denied* (Nov. 9, 2009) (unpub. Order). The Board also instructed the administrative law judge to determine the period during which claimant's benefits were suspended due to claimant's unjustified and unreasonable refusal to see Dr. Perry. *Id.*

Following a hearing on remand, the administrative law judge found that claimant's physical and mental problems combined to prevent him from performing any work as of the date of his last injury. He, therefore, awarded claimant permanent total disability benefits from April 25, 2005, to July 7, 2008, and then entered a continuing award of permanent total disability benefits from December 1, 2009, based on an average weekly wage of $389.70.[1] The administrative law judge also found employer liable for medical benefits relating to claimant's visits with Dr. Bernauer, including claimant's travel expenses to and from the physician's office, as well as for claimant's referral to a neurologist for further evaluation of his April 25, 2005, injury as recommended by Dr. Bernauer.

Claimant, without the assistance of counsel, appeals the administrative law judge's decision on remand. BRB No. 11-0477. Employer responds, urging rejection of claimant's contentions. In its cross-appeal, employer challenges the administrative law judge's evidentiary findings relating to Dr. Bernauer and the introduction of claimant's exhibits at the hearing on remand, as well as the administrative law judge's award of permanent total disability and medical benefits.[2] BRB No. 11-0477A.

The Board, in its August 14, 2009, decision, affirmed the administrative law judge's average weekly wage determinations, as well as the administrative law judge's decision to suspend claimant's compensation benefits during the period he unreasonably refused to be examined by Dr. Perry. *Goins*, Aug. 14, 2009, slip op. at 9-10. As the Board fully addressed these issues in its prior decisions, and there is no basis for finding that the law of the case doctrine should not apply, the Board's holdings constitute the law of the case. *See, e.g., Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998). Claimant's contentions relating to these issues are therefore rejected, and the administrative law judge's findings are affirmed.

[1]The administrative law judge suspended the payment of permanent total disability benefits for the period during which claimant unreasonably refused to be examined by Dr. Perry, *i.e.*, from July 8, 2008, through November 30, 2009. 33 U.S.C. §907(d)(4).

[2]Claimant responds, seeking "reasonable fees" for his self-representation in pursuit of all of his claims. We reject claimant's contention as employer cannot be held liable for work performed by a lay representative. 33 U.S.C. §928(a), (b); *Todd Shipyards v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *see also Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom., Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

As for the dates of the suspension of compensation benefits pursuant to Section 7(d)(4), at the hearing on remand the administrative law judge showed the parties his July 8, 2008, Order compelling claimant to attend an examination by Dr. Perry, followed by evidence of claimant's immediate refusal to attend and his eventual compliance on November 30, 2009, when Dr. Perry examined claimant. HT at 8-9. The administrative law judge thus concluded that compensation benefits should be suspended for the period from July 8, 2008, to November 30, 2009. Decision and Order on Remand at 2. As this finding is supported by substantial evidence, it is affirmed.[3] *B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101 (2007).

In its appeal, employer initially argues that the administrative law judge erred by allowing claimant to introduce exhibits at the remand hearing, and by thereafter ordering employer to obtain a narrative report from claimant's treating physician, Dr. Bernauer, post-hearing and after the record was closed, without allowing it the opportunity to depose Dr. Bernauer for the purpose of clarifying inconsistencies in the physician's three post-hearing reports. Employer contends that the administrative law judge's actions relating to these reports violates 29 C.F.R. §§18.54, 18.55, which restrict the admission of evidence in a case once the record is closed and enable the opposing party the opportunity to respond to such evidence.

An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if they are shown to be arbitrary, capricious, or an abuse of discretion. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). We reject employer's reliance on the regulations at 29 C.F.R. §§18.54, 18.55, as the specific regulations promulgated under the Act, 20 C.F.R. §§702.338, 702.339, are applicable here.[4] 29 C.F.R. §18.1; *Wayland v. Moore Dry Dock*,

[3]The administrative law judge's finding on remand that claimant's psychological condition is not work-related is adverse to claimant, and is addressed, *infra*, in terms of employer's specific contentions.

[4]Section 702.338 states that the administrative law judge "shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." 20 C.F.R. §702.338. This regulation states that the administrative law judge may reopen the record for the receipt of evidence at any time prior to the issuance of a compensation order. *Id.* Section 702.339 states that the administrative law judge is not bound by formal rules of evidence but "may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." 20 C.F.R. §702.339; *see also* 33 U.S.C. §923(a).

21 BRBS 177 (1988). Moreover, the administrative law judge has the discretion to admit post-hearing evidence. *Wayland*, 21 BRBS at 180; 20 C.F.R. §702.338. We also reject employer's contention concerning the admission of claimant's exhibits. At the December 14, 2010, remand hearing, employer raised the issue that, despite the administrative law judge's pre-hearing directive to submit and exchange exhibits and witness lists, claimant did not identify any exhibits for introduction at the hearing. HT at 15. Nonetheless, employer stated that it would not object to claimant's exhibit 1, *id*., and it also acceded to the submission of claimant's exhibits 2 and 3 when the administrative law judge entered them into the record.[5] HT at 63, 69. Thus, employer's concessions preclude its ability to now argue that this evidence should not have been admitted.

As for the post-hearing reports of Dr. Bernauer, the record establishes that employer likewise consented to the administrative law judge's actions. In this case, the administrative law judge, after consideration of the post-hearing record, found "it necessary to inquire further into claimant's physical status following the April 25, 2005, injury," from Dr. Bernauer because, as claimant's treating physician, "he's probably the most knowledgeable from a treatment standpoint." Order dated December 20, 2010; TCT at 3. Rather than object, employer's counsel responded "yes, sir," that "I understand," and that it is "okay" to obtain that additional evidence.[6] TCT at 3, 5. Additionally, the administrative law judge specifically informed employer that it could depose Dr. Bernauer "when we get [the physician's report]." TCT at 3. Employer thus had a period of approximately three weeks, *i.e.*, from its January 20, 2011, receipt of Dr. Bernauer's narrative report until the administrative law judge issued his February 14, 2011, Order closing the record, in which it could have sought to depose Dr. Bernauer. Employer, however, made no request to depose Dr. Bernauer until March 14, 2011, a month after the record had closed and after the decision on remand had been issued. Thus, it cannot be said that employer was prejudiced by the administrative law judge's actions in this case as employer was provided with notice and an opportunity to respond to Dr. Bernauer's post-hearing report. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999).

[5]Although employer indicated at the time that claimant's exhibit 1 was entered into the record that it would object to the admission of any other evidence by claimant, HT at 15-16, employer made no objection at the time claimant's exhibits 2 and 3 were entered into the record. HT at 69. In fact, employer acknowledged, with regard to claimant's exhibit 2, Dr. Ford's report, that "obviously, that was written to my office," even though counsel did not "remember ever seeing that." HT at 63.

[6]Employer's counsel also stated that he would "endeavor to expedite [obtaining the additional report] both with [employer] and with Dr. Bernauer." TCT at 5.

With regard to the merits of the administrative law judge's decision, employer argues that the administrative law judge erred in crediting Dr. Bernauer's opinions in his decision on remand given that he had previously rejected that physician's opinions in his original Decision and Order dated May 8, 2007, and the Board, in its August 14, 2009, decision, did not remand the case for reconsideration of that physician's opinion. Similarly, employer challenges the administrative law judge's finding that claimant is a credible witness, contending the record is replete with examples of claimant's unwillingness to tell the truth. Employer also argues that the administrative law judge erred by not considering Dr. Yanicko's entire report as instructed by the Board, and by not crediting his opinion that claimant was capable of returning to his usual work as of July 6, 2006.

The administrative law judge found that in the absence of a more detailed explanation from Dr. Yanicko,[7] he was crediting Dr. Bernauer's explanation,[8] as well as claimant's statements,[9] to find that claimant's pain complaints and limitations relate to his April 25, 2005, injury and limit him to, at most, light-duty work. The administrative law judge added that Dr. Perry's statements, that claimant is unable to perform his usual heavy longshore work and is at best limited to light or sedentary work, support his conclusion that claimant is incapable of returning to his usual longshore employment. Moreover, the administrative law judge accorded diminished weight to Dr. Perry's theory

[7]At the remand hearing, the parties discussed Dr. Yanicko's report of July 5, 2006, HT at 38-45. The administrative law judge stated that Dr. Yanicko's opinion appears to be equivocal in that "he seems to say at one point [claimant] can go back and do the work," but then says, "let's have him really evaluated by a work-hardening program." HT 45. The administrative law judge thus fully considered the entirety of Dr. Yanicko's opinion.

[8]In his January 13, 2011, letter, Dr. Bernauer stated: that while he does not have the April 25, 2005, accident in his report, any aggravation from that accident "is still active and is not resolved at this time;" that claimant is presently capable of light duty type work; and that "there is no way he can return to his job description as a longshoreman, lifting heavy sacks." In his letter, dated February 4, 2011, Dr. Bernauer added that claimant's "ongoing problems at this time are related to the 2004 accident and the 2005 accident, even though this was not reported to me," such that the 2005 accident "does impact on him at this time."

[9]The administrative law judge found that "despite claimant's severe mental problems, I nonetheless found him to be an honest and sincere witness with a tremendous desire to work despite multiple physical and mental handicaps." Decision and Order on Remand at 7.

that the April 25, 2005, incident resulted in only a temporary aggravation which had completely resolved, stating that it is, at best, "a guess from Dr. Perry, who unlike Dr. Bernauer, did not see claimant until November 2009, almost 3½ years after the accident." Decision and Order on Remand at 8. The administrative law judge also found that Dr. Perry's conclusion ignored claimant's complaints of shoulder and back pain following the April 25, 2005, incident and the positive MRI findings; specifically, Dr. Bernauer noted that claimant had a herniated disc in his back per an MRI of May 9, 2006, which was not present on an MRI taken prior to the April 25, 2005, accident.

It is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw his own inferences and conclusions from it; the Board is not empowered to reweigh the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge rationally credited the opinion of Dr. Bernauer, in conjunction with claimant's contemporaneous complaints of pain, to conclude that from a physical standpoint claimant has been unable to return to his usual longshore employment following the April 25, 2005, accident. *See generally Migangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We, therefore, reject employer's contentions that the administrative law judge improperly weighed the evidence regarding claimant's physical ability to perform his usual work as a result of injuries sustained in his April 25, 2005, work accident. The administrative law judge's finding that claimant established a *prima facie* case of total disability is affirmed. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Employer next argues that the administrative law judge, in finding claimant totally disabled, erred in relating claimant's psychological condition to his physical condition. In its prior decision, the Board reversed the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to claimant's psychological condition as neither psychiatrist, Dr. Quillan nor Dr. Culver, gave an opinion to a reasonable degree of medical probability that claimant's psychological condition was not caused or aggravated by his work-related injuries. *Goins*, Aug. 14, 2009, slip op. at 6. The Board thus held that "[a] causal relationship between claimant's employment and his psychological condition is established as a matter of law." *Id.* As the administrative law judge rationally permitted employer to submit additional evidence into the record on remand, the law of the case doctrine does not apply to the Board's holding. *See generally Weber v. S.C. Loveland Co.*, 35 BRBS 75, 77 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

In this case, employer submitted, on remand, additional evidence regarding claimant's psychological condition, *i.e.*, the December 4, 2009, report of licensed clinical psychologist, John M. Boutte, PhD, and the January 7, 2010, re-evaluation report of claimant by Dr. Culver and his April 6, 2010, follow-up letter. Although Dr. Boutte opined that he could not determine if claimant's psychological condition resulted from his past employment, EX 6, Dr. Culver opined that none of claimant's psychological conditions was caused, aggravated, accelerated, or precipitated by the occupational injuries he sustained with employer. *Id.* On remand, the administrative law judge credited Dr. Culver's opinion that claimant's work injury did not cause claimant's psychological condition. This evidence is sufficient to establish rebuttal of the Section 20(a) presumption with regard to claimant's psychological condition. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Moreover, the administrative law judge found that the record does not establish by a preponderance of the evidence that claimant's work injury caused or aggravated claimant's psychological problems. The administrative law judge's finding on remand that claimant's psychological condition is not work-related is affirmed as it is supported by substantial evidence. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

In his decision on remand, the administrative law judge found that employer is "responsible for claimant's mental health treatment" and that "it has met this obligation by accepting Dr. Bernauer's referral to Dr. Bouttee." Decision and Order on Remand at 10. Nevertheless, the administrative law judge did not make any specific award of medical benefits relating to further psychological treatment, noting only that employer is not responsible for approving claimant's request for a change in a treating psychologist to Dr. Haag. Consequently, we hold, as a matter of law, that employer is not liable for any further treatment of claimant's non-work-related psychological condition. *See* 33 U.S.C. §907(a).

Nonetheless, we reject employer's contention that the non work-relatedness of claimant's psychological condition affects the administrative law judge's award of permanent total disability benefits. As discussed, claimant has established a *prima facie* case of total disability, based on the administrative law judge's finding that claimant has been, since the April 25, 2005, accident, *physically* incapable of returning to longshore employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also* Decision and Order on Remand at 8. Additionally, employer has not put forth any evidence regarding the availability of suitable alternate employment; thus, claimant is entitled to permanent total disability benefits. *Id.; see also* Decision and Order dated May 8, 2007, n. 1 at 2; EXs on Remand 1-10. In any event, we note that restrictions from pre-existing conditions are to be considered in addressing a claimant's

ability to work in alternate employment. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). In this case, Drs. Culver and Boutte agree that claimant is incapable of performing any work due to his pre-existing psychological condition and claimant has physical restrictions from the work injury. Given these factors, we affirm the administrative law judge's award of permanent total disability benefits as it is rational, supported by substantial evidence, and in accordance with law. *See generally Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

Lastly, employer argues that the administrative law judge erred in finding it liable for claimant's medical treatment with Dr. Bernauer, given that the administrative law judge had previously discredited Dr. Bernauer's opinions and since Dr. Perry opined that no further treatment of claimant's physical conditions was warranted. Employer is liable under Section 7(a) for reasonable medical benefits necessary to treat the work injury. 33 U.S.C. §907(a). The administrative law judge found that employer did not contest either the charges for claimant's visits to Dr. Bernauer or claimant's travel expenses to Dr. Bernauer, and he concluded that they are reasonable and necessary. Additionally, the administrative law judge likewise found that Dr. Bernauer's request for a neurological evaluation is reasonable and necessary in light of claimant's lumbar MRI showing a herniated disc. The administrative law judge thus ordered employer to pay Dr. Bernauer for claimant's visits from April 25, 2005, to July 7, 2008, and from December 1, 2009, to the present and continuing, and to pay for claimant's referral to a neurologist for further evaluation of his April 25, 2005, injury as recommended by Dr. Bernauer. As the administrative law judge found, there is no evidence that employer challenged the reasonableness and/or necessity of this treatment before the administrative law judge. Employer's post-hearing brief to the administrative law judge makes no challenge to claimant's request for medical benefits, other than to argue that it is generally not liable to claimant for any additional benefits as claimant's conditions are not related to his April 25, 2005, accident. Moreover, the award of medical benefits is supported by substantial evidence. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). We thus affirm the administrative law judge's award of medical benefits relating to the treatment claimant received from and recommended by Dr. Bernauer. *See generally Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981); 33 U.S.C §907(a); 20 C.F.R. §702.401.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge